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In the Supreme Court of the United States

OCTOBER TERM, 1987

DON'S PORTA-SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The sole issue presented on this petition is whether the Courts of Appeal are to review de novo (rather than under a "clearly erroneous" standard of review) a determination *in favor* of a party asserting First Amendment rights as they do certain determinations *against* an asserted First Amendment right. Two circuits have decided the question one way and two have decided the other way, all purporting to follow this Court's decision in *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1984).

New Ninth Circuit Case

Since this petition was filed, the Ninth Circuit has expressly adopted the position argued by petitioners. *The Daily Herald Co. v. Munro,* 1988 U.S. App. Lexis 1204 (Case No. 86-3641, 9th Cir., opinion filed February 2, 1988). The district court there, ruling in favor of the party claiming First Amendment rights, held that the statute was not the least restrictive means of advancing the state's interest. The Ninth Circuit affirmed, explicitly noting that

> The Constitution requires *different standards* for reviewing findings of fact in those cases in which the district court *upholds a restriction* on speech as constitutional *than in those in which it does not.* When a district court *holds a restriction* on speech *constitutional, we conduct an independent, de novo examination* of the facts. When the *government* challenges the district court's holding that the government has unconstitutionally restricted speech, on the other hand, we review the district court findings of fact for *clear error.* This rule "reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged," while not affording special protection "for the government's claim that it has been wrongly prevented from restricting speech." In this case, therefore, we review the district court's findings of fact for clear error (Emphasis added).

The Ninth Circuit's position is precisely petitioners' position on their writ for certiorari. What is crystally clear now is that four United States Courts of Appeals have split in determining whether the independent review standard of *Bose Corporation* applies to cases where

the district court judgment is in favor of the party asserting First Amendment rights. The Fifth (*Bartimo, Dunagin, Lindsay*) and the Eleventh (*Don's Porta-Signs*) Circuits have held that the independent review standard applies. The Seventh (*Planned Parenthood*) and Ninth (*Daily Herald*) Circuits have held that it does not apply. There is irreconcilable conflict among the circuits. Supreme Court Rule 17.1(a).

City's Misreading of Bose Corporation

The City had told the Eleventh Circuit that the "clearly erroneous" standard applies, but now seeks to support the Eleventh Circuit after the fact by asserting an unjustified reading of *Bose Corporation.* The City does not dispute the fact that all fourteen of the cases cited in *Bose Corporation* for independent review were decided in the court below *against* the party asserting First Amendment rights. Nor does the City dispute the fact that this Court has never sanctioned or undertaken an independent review of the facts in the record to ensure that the trial court did not afford the parties their First Amendment rights too broadly.

The City overlooks the rationale and constitutional underpinnings of *Bose Corporation.* For example, at pages 5-6 of its brief, the City quotes and underscores a portion of *Bose Corporation,* but fails to emphasize the important part of this Court's language: that "judges—and particularly Members of this Court—must exercise [independent] review in order to preserve the precious liberties established and ordained by the Constitution" and that "the Court has regularly conducted an independent review of the record book to be sure that the speech in question actually falls within the unprotected

category . . . in an effort to ensure that protected expression will not be inhibited."

The City ignores the rationale of *Bose Corporation* and the Supreme Court cases cited in petitioners' petition, primarily relying instead on the two Fifth Circuit cases, *Bartimo v. Horsemen's Benevolent and Protective Association,* 771 F.2d 894 (5th Cir. 1985), *cert. denied,* 475 U.S. 1119, 106 S.Ct. 1635, 90 L.Ed. 2d 181 (1986), and *Lindsay v. City of San Antonio,* 821 F.2d 1103 (5th Cir. 1987), *cert. denied,* ..... U.S. ....., 108 S.Ct. 707, 98 L.Ed. 2d 658 (1988). Like the City, *Bartimo* and *Lindsay,* however, ignored the rationale of or misunderstood *Bose Corporation* and other cases from this Court.

The City, purporting to rely on footnotes 16 and 29 from *Bose* and *Bartimo,* claims that appellate courts must "define the perimeter of [First Amendment] rights to *ensure that they are not abused,*" that is, not exercised too broadly (City Brief 8, 15). Neither the footnotes nor *Bartimo* provide any such support for federal appellate courts to police the exercise of First Amendment rights to ensure that they not be exercised too broadly.

The City also attempts to rationalize that the findings were mixed findings of law and fact (page 4), but the Eleventh Circuit was clear that it was applying an independent review standard not because there were mixed findings of law and fact, but because *Bose Corporation* applied (Appendix 56-a).

City's Arguments on the Factual Merits of the Ordinance

The City claims in footnote 5 at page 13 that petitioners fail to contest or even address the "substantive

issues" presented below.[1] The City is totally incorrect. This Court is primarily a court to review questions of law, rather than findings of facts. What petitioners challenge in this Court is the legal standard which the Eleventh Circuit applied.

City's Assertion That Denial of Certiorari Is Binding Precedent

The City places great emphasis on the fact that this Court denied certiorari in *Lindsay v. City of San Antonio,* 821 F.2d 1103 (5th Cir. 1987), *cert. denied,* ..... U.S. ....., 108 S.Ct. 707, 98 L.Ed. 2d 658 (1988) (City Brief 10). The denial of certiorari in *Lindsay* was not "notable" at all. First, *Lindsay* involved certiorari from the denial of a preliminary injunction, not from a final judgment. Second, the petition for certiorari in *Lindsay* was primarily fact oriented; here, the petition for certiorari is solely legally oriented.

The City suggests in footnote 8 at page 15 of the City's brief that this Court's denial of certiorari in *Dunagin, Lindsay,* and *Bartimo* "provides binding precedent for federal courts of appeal and district courts to follow." The City cites *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed. 2d 199 (1977), but *Mandel* concerned summary affirmances and dismissals for want of sub-

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1. The City claims that the ordinance contains exemptions for political and other non-commercial speech. Although the factual merits are beyond this petition, the exemptions for political signs are very narrow (Appendix 74-a-77-a), and even the Eleventh Circuit did not reverse the district court's finding that the regulations "single out the small businessman, non-profit organization and political candidate." The regulations would preclude a church, for example, from using portable signs for publicizing its Christmas and Easter services because Christmas and Easter are within 180 days (Appendix 124-a).

stantial federal questions, not denials of petitions for certiorari. Denials of petitions for certiorari clearly have no precedential effect. *Hopfmann v. Connolly,* 471 U.S. 459, 105 S.Ct. 2106, 85 L.Ed. 2d 469 (1985); *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 366 n.1, 93 S.Ct. 647, 650 n.1, 34 L.Ed. 2d 577 (1973); *Daniels v. Allen,* 344 U.S. 443, 497, 73 S.Ct. 397, 97 L.Ed. 469 (1953); *Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912, 919, 70 S.Ct. 252, 255, 94 L.Ed. 562 (1950) (Frankfurter, J.); *Sunal v. Large,* 332 U.S. 174, 181, 67 S.Ct. 1588, 1592, 92 L.Ed. 368 (1947); *House v. Mayo,* 324 U.S. 42, 48, 65 S.Ct. 517, 521, 89 L.Ed. 739 (1945). See Supreme Court Rule 17.1.

CONCLUSION

The very important legal questions concerning the applicability of *Bose Corporation* and the role of federal courts of appeal in First Amendment cases remain unresolved. As the cases from the Fifth, Seventh, Ninth and Eleventh Circuits indicate, those questions go far beyond portable signs. They should be resolved.

WHEREFORE, Petitioners would request this Court to grant the petition for writ of certiorari because the Eleventh Circuit decision conflicts with Federal Rule of Civil Procedure 52, precedent from this Court, precedent from other circuits, and the federal courts' historic role in protecting First Amendment rights.

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